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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

CLIFFORD SEVERSON and MABEL SEVERSON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the 7th Circuit entered in the above case on July 23, 1971.

OPINIONS BELOW

The opinion of the District Court for the Western District of Wisconsin is reported at 309 F. Supp. 915 (1970) (App. A1). The opinion of the Court of Appeals for the 7th Circuit has nct as yet been reported. It is set forth here at App. A6.

JURISDICTION

The opinion and judgment of the Court of Appeals for the 7th Circuit was made and entered on July 23, 1971 and a copy thereof is appended to this petition in the Appendix at Pages A1-A12.

A motion for rehearing was denied on Monday, September 13, 1971. Copy of such denial is appended to this petition in the Appendix at Page A13.

The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Appellants own land on the eastern shore of the Mississippi River in Vernon County, Wisconsin. Opposite Appellants' riparian land is an island lying in Wisconsin and East of the center of the main channel of the Mississippi River. This island was *not* surveyed by the United States Government in the original survey of this area in 1845 and 1846 nor in the Government surveys of 1866 and 1874. It was surveyed in 1935. The parties hereto by their attorneys stipulated that this land is 50% under flood waters of the Mississippi River at least once each year and is entirely submerged about once each five years at times of unusually high water. Under the Law of the State of Wisconsin as laid down by its Supreme Court in a case involving an island in the Mississippi River but a few miles from the island here involved (*Franzini* v. *Layland*, 120 Wis. 72), appellants claimed title to this land as riparian owners of the eastern bank of the Mississippi River. Respondent United States of America brought this suit to quiet title in United States of America and to eject appellants from the island.

The District Court and Court of Appeals held with the United States and quieted title in United States and ordered ejectment.

Question Number One

In *Scott* v. *Lattig*, 227 U. S. 229 (1913) and *Moss* v. *Ramey*, 239 U. S. 538 (1916) the Supreme Court of the United States held that title to islands in a navigable stream did not pass to the state when created or come within "the disposing influence of its laws". In both those cases this Court found the islands there involved were "fast, dry land".

Does the ruling in those cases (that title to islands remains in the United States and does not pass to the state when created) apply to *every* island in *every* navigable stream in the United States or does it only apply to islands that are "fast, dry land"?

Question Number Two

If the answer to the above question "One" is that this Court's decision in those two cited cases only applies to islands that are "fast, dry land", is an island such as is here involved which island is fifty percent covered each year by normal high water and entirely submerged at least every five years in abnormally high water (as stipulated by the parties and their attorneys) "fast, dry land"?

Question Number Three

The Northwest Ordinance provided that it was a "compact" between the original states and the people in the states to be created out of the Northwest Territory which includes Wisconsin. The Northwest Ordinance further provided that the inhabitants of the Northwest Territory should always be entitled to "judicial proceedings accord-

ing to the course of the common law". Under English common law an island in a stream unaffected by the tide belonged to the riparian owner (and that common law rule has been approved by this Court. *Hardin* v. *Jordan*, 140 U. S. 371). Under that rule the Supreme Court of Wisconsin held that an island in the Mississippi River belongs to the riparian owner. (*Franzini* v. *Layland*, 120 Wis. 72).

Does the Northwest Ordinance give a riparian land owner in Wisconsin such title to an island opposite his land as he can enforce in a United States Court?

Question Number Four

Should not this court again review this matter of ownership of an island in a river above the effect of the tide and hold that the real estate law of the state where the island is located should apply to all islands in that state above the effect of the tide?

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES OR REGULATIONS

The Northwest Ordinance is set forth in full at American Jurisprudence (2d) Desk Book, Document No. 5, page 51.

The part used here in this petition is the following:

> "It is hereby ordained and declared by the authority aforesaid, That the following articles shall be considered as articles of compact between the original States and the people and States in the said territory and forever remain unalterable, unless by common consent, to wit:
>
> Art. 1. (Omitted)

Art. 2. The inhabitants of the said territory shall always be entitled to the benefits of the writ of *habeas corpus,* and of the trial by jury; of a proportionate representation of the people in the legislature; and of judicial proceedings according to the course of the common law. * * *"

STATEMENT OF THE CASE

The facts here involved were agreed to by stipulation of the parties. Thus there is no conflict in the evidence. The Appellants Clifford Severson and his wife, Mabel Severson, own land on the East shore of the Mississippi River in Vernon County, State of Wisconsin. Opposite their land and between their shore (riparian) land and the center of the main stream of the Mississippi River lies the island, title to which is here involved. This island was *not* surveyed by the United States Government in the original survey of this area in 1845 and 1846 nor in the Government surveys of 1866 and 1874. It was surveyed in 1935. These appellants made claim to ownership of this land. The Respondent United States of America brought this law suit in the United States District Court for the Western District of Wisconsin, Judge James Doyle presiding, to quiet title to this island in United States of America and to eject the petitioners from it.

Judgment went to the plaintiff and the defendants appealed. The Court of Appeals (7th Circuit) affirmed.

This island was not included in the original Government survey of this area in 1845 although that survey contained a vague reference to its then existence. (In view of the fact that it is undisputed that 50% of this island is under water each year for several weeks at normal high water mark and all of the island is under water about every five years in times of abnormally high water, it is a fair

inference that at the first survey in 1845 the island was either 50% or all under water and so omitted from the survey.)

In the District Court Judge Doyle held that *all* islands in *all* navigable steams whether "fast, dry land" or under water most of the year anywhere in the United States, are, and remain, the property of the United States unless specifically deeded away (In Wisconsin any stream that will float a log or canoe is a navigable stream.) (*Olson* v. *Merrill*, 42 Wis. 203, 212 (1877)) and, therefore, held that the title to the island here involved did not pass to the State of Wisconsin when the state was created in 1848 and was not within the "disposing influence of its laws", and, therefore, did not pass to the riparian land owner as held by the Supreme Court of Wisconsin. (*Franzini* v. *Layland*, 120 Wis. 72). On appeal the Court of Appeals held (by inference) that this island was "fast, dry land" and that as it was in existence when the State of Wisconsin was created in 1848, the title remained in the United States and did not pass to the riparian owner as held by the Supreme Court of Wisconsin. The Court of Appeals likewise held that conceding the Northwest Ordinance was and is a compact or contract between the United States and the citizens of the Northwest Territory (therefore Wisconsin) and conceding that that compact guaranteed to a citizen of Wisconsin "judicial proceedings according to the course of the common law", and conceding that under the common law the riparian owner (such as these plaintiffs) owned all islands opposite his land to the thread of the Mississippi River, yet conceding all of these things, no court having held that this Northwest Ordinance was legally binding on the United States of America, therefore, without such a precedent, that court (Court of Appeals) would not establish it in this case.

The Court of Appeals grounded its decision on *Scott* v. *Lattig,* 227 U. S. 229. That case involved an island in a river in Idaho. This Court there held that the island there was "fast, dry land" and upon creation of the State of Idaho, such island remained the property of the United States and did not "come within the disposing influence" of the laws of the State of Idaho. In a later decision (*Moss* v. *Ramey,* 239 U. S. 538, 546), involving again an island in a river in Idaho, this Court held that the island was "fast, dry land" and did not come within the "disposing influence" of Idaho laws. In several cases where the island involved was not "fast, dry land" this Court has held that the island was within the "disposing influence" of the state law. See *Grand Rapids and Indiana R. Co.* v. *Butler,* 159 U. S. 87; *United States* v. *Chandler-Dunbar Water Power Company,* 209 U. S. 447; *Whitaker* v. *McBride,* 197 U. S. 510.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals in this case overruled the settled real estate law of Wisconsin and of every state created out of the Northwest Territory as such law applied to riparian land owners.

II.

The decision of the Court of Appeals decided an important question of federal law which has not been settled but should be settled by this Court. (Decision—That the federal government owns every island in every navigable stream in the United States unless it has specifically deeded it away.)

III.

This Court in *Scott* v. *Lattig*, 227 U. S. 229, and in *Moss* v. *Ramey* held that the islands there involved were "fast, dry land" and title to them did not pass from the United States when the State of Idaho was created but remained in the United States and were not subject to the "disposing influence" of the Idaho state law which gives ownership of all islands in the state to the riparian owner. In those cases this Court, although it emphasized that the islands there involved were "fast, dry land", did not specifically ground its decision (that the United States still owned the islands) upon the fact that the islands were "fast, dry land". Thus this case presents the question: Does the rule of law laid down by this Court in those two cases only apply to islands that are "fast, dry land" or does it apply to all the millions of islands of all shapes, sizes and description in all navigable streams throughout the United States?

Thus this case is important as it bears on the title to almost all islands in every stream in the United States.

IV.

If this Court holds that the rule laid down by this Court only applies to islands that are "fast, dry land" then is the island here involved "fast, dry land"? The parties here involved agreed that the island at bar was 50% under water at least once each year for weeks at a time and all entirely under water at least every five years in times of abnormally high water.

"Fast, dry land" is defined as land that is "above high water mark; upland as distinguished from flats or fenland."

> Funk and Wagnall's New Standard Dictionary of the English Language (1942 Edition), page 900.

"Fen" is defined in the same dictionary (page 908) as follows:

> "Low, flat, wet land covered with sedges, aquatic grasses; a marsh bog."
>
> Funk and Wagnall's New Standard Dictionary of the English Language, page 908.

V.

The Northwest Ordinance stated that it was a "compact" between the "original states" and the "people and states" in the territory covered and should remain "unalterable" except by "common consent". This ordinance also guaranteed to those states and their inhabitants "judicial proceedings according to the course of the common law". Under the common law an island in a stream above the effect of the tide was a non-navigable stream (in the eyes of the law) and all islands in a non-navigable stream belonged to the riparian owner. (And that common law rule has been approved by this court. *Hardin* v. *Jordan,* 140 U. S. 371.) The Supreme Court of Wisconsin applied this common law rule to an island in the Mississippi River but a few miles from the one here involved. (*Franzini* v. *Layland,* 120 Wis. 72). All states in the Northwest Territory have adopted this rule. Are not the petitioners entitled to assert their rights under the Northwest Ordinance, even against the United States of America? Certainly if the United States wanted this island, all it has to do is condemn.

VI.

Lastly, shouldn't this Court again review this entire subject of the ownership of islands? This court has always held that the ownership of land within the boundaries of a state should be governed by the real estate law of that

tate. *Eldridge* v. *Trezevant,* 160 U. S. 452. *Hardin* v. *Jordan,* 140 U. S. 371. *Edw. Hines Yellow Pine Trustees* v. *Martin,* 268 U. S. 458. And this court has emphasized that an unsurveyed island passes to the riparian owner if the state law gives title to the riparian owner. *Whitaker* v. *McBride,* 197 U. S. 510.

The island here was *not* surveyed in 1845 and until 1935 and by that time this title to this island had long been vested in the riparian owner.

CONCLUSION

The Court of Appeals decision in this case conflicts with the law of the State of Wisconsin as laid down by its Supreme Court. This case involves the title to every island in the United States that is not "fast, dry land". The importance of the case calls for this court to grant this petition for certiorari.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WISCONSIN

UNITED STATES OF AMERICA,
Plaintiff

v.

CLIFFORD SEVERSON and MABLE SEVERSON; and VERNON COUNTY, WISCONSIN, a public corporation,
Defendants

68-C-87

OPINION AND ORDER

(Filed February 20, 1970)

The United States has brought this action to clear a cloud on its title to certain land lying within this district and for ejectment. Jurisdiction is present under 28 U.S.C. § 1345.

A hearing has been held herein, and the parties have stipulated to most material facts. I find the facts to be as follows:

In 1862 and 1874 the United States patented and sold to certain individuals the then shorelands along the east bank of the Mississippi River, described as Government Lots 1 and 2, Section 5, Township 12 North, Range 7 West, 4th Principal Meridian, Vernon County, Wisconsin. At that time there lay immediately to the west of Lots 1 and 2 a river island (previously observed by surveyors) separated from Lots 1 and 2 by a slough. The westerly boundary of said island was defined by another slough known

as Thief Slough; immediately west of Thief Slough lay the island now called Island 126. Both of these islands lay east of the thread of the river. Since 1848 the thread of the river has marked the western boundary of the State of Wisconsin.

With the passage of time the slough between Lots 1 and 2 and the river island disappeared because of a gradual filling of the channel with silt. The lands lying east of Thief Slough and west of Lots 1 and 2 ceased to be an island and replaced Lots 1 and 2 as the eastern shore of the Mississippi River. In 1935 these new shorelands, the former island, were surveyed and were shown to contain 468.15 acres. The plat of the survey was approved on March 11, 1937. In 1943 the northern portion of the former island, designated as Lots 5, 6 and 7, Section 32, Township 13 North, Range 7 West, Fourth Principal Meridian, was patented by the United States to one Morris, who had previously established a homestead there. The southern portion of the former island, designated as Lots 2, 4 and 5 of Section 8 and Lot 4 of Section 9, Township 12 North, Range 7 West, Fourth Principal Meridian, was granted to the State of Wisconsin under the Swamp Land Act of September 28, 1850, 9 Stat. 519. The remaining lands on the former island—Lots 3, 4, 5, 6, 7, 8 and 9 and the west one-half of the southeast quarter, Section 5, and Lot 3, Section 8, Township 12 North, Range 7 West, Fourth Principal Meridian—were never sold or patented by the United States. These remaining lands, as well as Island 126, which is also unpatented, are administered by the United States as part of the Upper Mississippi Wildlife and Fish Refuge.

Defendants Clifford Severson and Mable Severson, residents of Wisconsin, acquired by a quit claim deed dated April 9, 1959, substantially all of Lots 1 and 2, Section 5, Township 12 North, Range 7 West. Lots 1 and 2 were

originally riparian to the slough which separated the shorelands from the river island. Defendant Vernon County has assessed and collected taxes on Lots 3, 4, 5, 6, 7, 8 and 9 and the west one-half of the southeast quarter of Sec-9 and the west one-half of the southeast quarter of Section 5.

The land here in dispute can be described as follows: All land lying west of the medial line surveyed in 1935 and shown on the survey plat approved on March 11, 1937 (plaintiff's exhibit 5). (The "medial line" is a line drawn down the center of the main channel of the former slough which separated Lots 1 and 2 of Section 5 from the former island). All such disputed land west of the medial line lies east of the center of the main channel of the Mississippi River and is included within the boundaries of the State of Wisconsin. Plaintiff United States does not claim any land lying east of said medial line. The disputed lands all lie west of Lots 1 and 2 of Section 5. Defendants Clifford Severson and Mable Severson, as owners of Lots 1 and 2 of Section 5, claim title to the real estate lying west of their land and to the center of the Mississippi River; such claim includes the unpatented portions of the former river island designated Lots 3, 4, 5, 6, 7, 8 and 9 and the west one-half of the southeast quarter, Section 5, as well as a 20 acre portion of Island 126 lying south of the extended section line between Section 5, Township 12 North, Range 7 West, and Section 32, Township 13 North, Range 7 West. All such land lying west of said Lots 1 and 2 was in existence at the time the State of Wisconsin was admitted to the Union, May 29, 1848, except that portion thereof filled in by the action of the river. Such land is substantial and lies above normal high water lines except in times of flood when it may be completely or partially covered by water for several weeks.

The theory of defendants' claims to the disputed real estate, based upon the facts as found above, is this:

When the United States in 1862 and 1874 granted patents to Lots 1 and 2 of Section 5 to defendants' predecessors in title, the patentees automatically, by operation of Wisconsin law, became the owners of all lands and islands lying directly west of Lots 1 and 2 but east of the thread of the river, including a portion of the former river island and a portion of Island 126. See *Franzini* v. *Layland*, 120 Wis. 72 (1903); *Chandos* v. *Mack*, 77 Wis. 573 (1890). As the present owners of Lots 1 and 2, defendants assert the claim said to have accrued to the patentees of Lots 1 and 2.

The theory of plaintiff's claims to the disputed real estate, based upon the facts as found above, is this:

The question as to the extent of the land granted by the United States under the patents to Lots 1 and 2 is exclusively a federal question to be determined in accordance with federal law. While it is correct under Wisconsin law that riparian owners own the riverbed and any islands up to the thread of a stream, the applicable federal law provides that all islands in existence on navigable streams at the time a state is admitted to the Union remain in federal ownership until specifically conveyed away. See *Scott* v. *Lattig*, 227 U.S. 229 (1913). Thus the patentees of Lots 1 and 2 could have obtained no title to lands that were then islands under the ownership of the United States; consequently, defendants have no title to such lands, which have remained unpatented.

I find that the facts of this case are very similar to those in *Blask* v. *Sowl*, Civil No. 3590, decided by this court on February 13, 1967. The legal arguments raised herein are identical to those raised and decided in *Blask, supra*. In *Blask*, the federal rule on the ownership of islands, as set forth in plaintiff's theory above, was held to be the law. Accordingly, judgment will be entered herein for plaintiff United States for the reasons stated in *Blask* v. *Sowl, supra*.

The record herein shows that defendant Vernon County was duly served with a copy of the summons and complaint on June 12, 1968. Defendant Vernon County has failed to appear and has failed to plead or otherwise defend this action. Judgment by default will therefore be entered against it in accordance with the demands of the complaint. Rule 55, F. R. Civ. P.

Upon the basis of the entire record herein, and for the reasons stated in *Blask* v. *Sowl, supra,* which are incorporated herein by reference,

IT IS ORDERED AND ADJUDGED,

(1) that title to Lots 3, 4, 5, 6, 7, 8 and 9, and the west one-half of the southeast quarter of Section 5, Township 12 North, Range 7 West, 4th Principal Meridian, and that portion of Island 126 lying south of the extended section line between Section 5, Township 12 North, Range 7 West, and Section 32, Township 13 North, Range 7 West, all in Vernon County, Wisconsin, is in the United States of America;

(2) that defendant Vernon County is enjoined from assessing taxes against any portion of the lands described in paragraph (1) above, and that any taxes assessed against any portion of the lands described in paragraph (1) by defendant Vernon County at any time prior to this date are declared null, void and unenforceable against the United States; and

(3) that plaintiff is granted a judgment of ejectment of defendants from the premises described in paragraph (1).

Entered this 20th day of February, 1970.

By the Court:

/s/ James E. Doyle

District Judge

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1970
JANUARY SESSION, 1971

No. 18476

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
CLIFFORD SEVERSON and MABEL SEVERSON,
Defendants-Appellants,
and
VERNON COUNTY, WISCONSIN, a public corporation,
Defendant.

Appeal from the United States District Court for the Western District of Wisconsin.

JULY 23, 1971

Before DUFFY, *Senior Circuit Judge*, FAIRCHILD, *Circuit Judge*, and GRANT, *Chief District Judge*.[1]

FAIRCHILD, *Circuit Judge*. This action was brought by the United States to quiet title in itself to portions of an island and of a former island in the Mississippi River.

1. Honorable Robert A. Grant, Chief Judge, Northern District of Indiana, is sitting by designation.

The defendants Severson claim under their title to government lots which, when surveyed and platted, formed the river bank. Defendant Vernon county has levied taxes. The United States prevailed in the district court and the Seversons have appealed.

The parties waived a jury and the case was tried to the court on a stipulation of facts and documentary evidence. The district court made findings, in part, as follows:

> "In 1862 and 1874 the United States patented and sold to certain individuals the then shorelands along the east bank of the Mississippi River, described as Government Lots 1 and 2. [Sec. 5 - T.12-R.7] At that time there lay immediately to the west of Lots 1 and 2 a river island (previously observed by surveyors) separated from Lots 1 and 2 by a slough. The westerly boundary of said island was defined by another slough known as Thief Slough; immediately west of Thief Slough lay the island now called Island 126. Both of these islands lay east of the thread of the river. Since 1848 the thread of the river has marked the western boundary of the State of Wisconsin.
>
> "With the passage of time the slough between Lots 1 and 2 and the river island disappeared because of a gradual filling of the channel with silt. The lands lying east of Thief Slough and west of Lots 1 and 2 ceased to be an island and replaced Lots 1 and 2 as the eastern shore of the Mississippi River. In 1935 these new shorelands, the former island, were surveyed. . . . The plat of the survey was approved on March 11, 1937. In 1943 the northern portion of the former island . . . was patented by the United States to one Morris, who had previously established a homestead there. The southern portion of the former island . . . was granted to the State of Wisconsin under the Swamp Land Act of September 28, 1950, 9 Stat. 519. The remaining lands on the former island

> [land in section 5, immediately west of lots 1 and 2, and in dispute, plus a portion of section 8, not here involved] were never sold or patented by the United States. These remaining lands, as well as Island 126, which is also unpatented [and in dispute], are administered by the United States as part of the Upper Mississippi Wildlife and Fish Refuge.
>
> . . . .
>
> "The lands here in dispute can be described as follows: All land lying west of the medial line surveyed in 1935 and shown on the survey plat . . . (The 'medial line' is a line drawn down the center of the main channel of the former slough which separated Lots 1 and 2 of Section 5 from the former island). . . . All such land lying west of said Lots 1 and 2 was in existence at the time the State of Wisconsin was admitted to the Union, May 29, 1848, except the portion thereof filled in by the action of the river. Such land is substantial and lies above normal high water lines except in times of flood when it may be completely or partially covered by water for several weeks."

Sustaining the title of the United States rests upon two propositions. One is that since the land in dispute was in existence as two islands in a navigable river when Wisconsin became a state, "ownership did not pass to the state, or come within the disposing influence of its laws" (as did ownership of the river bed), but "remained the property of the United States and subject to disposal under its laws." The other proposition is that the 1862 and 1874 patents, conveying lots 1 and 2 according to the plat, did not convey the then existing, but unsurveyed, islands. Both propositions necessarily follow from the 1913 decision of the Supreme Court of the United States in *Scott* v. *Lattig*[2] from which the foregoing quotations are taken.

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2. 227 U.S. 229.

The Seversons point out that in *Scott*, the Court described that island as "fast dry land." The Court distinguished earlier decisions by noting that in one case, "the evidence left it uncertain whether the so-called island was more than a 'low sand bar, covered a good part of the year with water' ";[3] that in another it was said: "The islands are little more than rocks rising very slightly above the level of the water and contain respectively a small fraction of an acre and a little more than an acre . . .";[4] and that another "related to a small island, in a non-navigable river, which the Land Department of the United States had expressly refused to survey. . . ."[5]

The Seversons argue that the land in dispute was not and is not "fast dry land" because in normal high water at least 50% is under water and in the abnormally high water of 1965 and 1969, it was virtually all under water. On the other hand, the record shows the following: A river island separated from lots 1 and 2 was drawn in outline upon the plat of the 1845 survey. Both islands are shown on an 1866 map called the Warren Survey Plat. A chart of a survey under the direction of the Mississippi River Commission, dated 1894, shows Island 126 as an island and shows the former island as part of the mainland. The county plat book for 1896 shows the same. The portion of Island 126 in dispute contains 20 acres and the portion of the former island in section 5, 254.31 acres. As surveyed, platted, and patented, lot 1 consists of 38.4 acres and lot 2 of 33.6.

Notes of the 1935 survey of the former island indicate the surveyor found an elm stump 30 inches in diameter,

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3. *Grand Rapids & I.R. Co.* v. *Butler* (1895), 159 U.S. 87.

4. *United States* v. *Chandler-Dunbar Water Power Co.* (1908), 209 U.S. 447.

5. *Whitaker* v. *McBride* (1905), 197 U.S. 510.

cut about ten years before and showing 100 annual rings. The surveyor was told by Mr. Morris who lived on the portion of the former island in section 32 of township 13, to the north, that he had lived there since 1895, raised crops and had grubbed out numerous oak stumps which were from 20-30 inches in diameter. The surveyor noted that land in section 9, to the south, was considerably lower and swamp, but that the remainder of the former island was upland in character and producing crops without artificial drainage or the construction of levees.

We think the finding that the islands were in existence (within the meaning of *Scott* v. *Lattig*) at the time of statehood and at the dates of the patents was not clearly erroneous.

Since the finding is correct, and hence ownership remained in the United States when Wisconsin became a state, the Seversons could prevail only, if the patents to which they trace their title were construed as conveying the portions of the islands between lots 1 and 2 and the thread of the river, as well as lots 1 and 2 as described in the plat. The Seversons rely on two Wisconsin decisions which do, indeed, support their claim. *Franzini* v. *Layland* (1903), 120 Wis. 72, 97 NW 499, dealt with title to an island in the Mississippi three miles north of the land involved here. The facts are sufficiently similar. The Supreme Court of Wisconsin held, construing the patent "that a riparian proprietor on a river, nothing appearing clearly to the contrary, owns, as incident to the shore, all islands opposite the same so far as his riparian rights extend. *Chandos* v. *Mack*, 77 Wis. 573, 46 NW 803. The conveyance to the riparian proprietor of the title to the land in such a case is deemed to have been included in the conveyance of the main land. As regards the original proprietor, the general government, the omission to take

notice of the existence of an island in making the public land surveys, and approval of the survey by sovereign authority, evidences that the omitted land was intended to pass as an incident of the land it lies opposite of, and is appurtenant to it if to any." p. 83.

In a similar situation, *Chandos,* decided in 1890, had held, construing a patent to platted government lots on the river bank, that where there was nothing to show that the government intended to reserve an unsurveyed island between the lots described and the middle of the river, "the presumption is that the government did include [the island] and pass all title to it to the purchaser." p. 576.

> "The construction of grants by the United States is a Federal not a state question . . . and involves the consideration of state questions only in so far as it may be determined as a matter of Federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances."[6]

In *Scott* v. *Lattig, supra,* the Supreme Court decided that the patent which conveyed surveyed government lots on the bank of a navigable river, according to the plat, did not convey an unsurveyed island between the lots and the thread of the stream. There was no suggestion that the construction was dependent upon or would yield to state (in that case, Idaho) doctrine. The report shows, moreover, that an argument had been made, citing Idaho cases, that "Unsurveyed islands between the bank and the thread of the main channel, not omitted from the survey by fraud or mistake, pass with the mainland to the riparian patentee." The argument was rejected.

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6. *United States* v. *Oregon* (1935), 295 U.S. 1, 28, 79 L.Ed. 1267. See *Gibson* v. *Chouteau* (1872), 80 U.S. 92.

Applying the explanations in *Scott* v. *Lattig* to our present case, the unsurveyed islands, existing at the time of statehood, remained the property of the United States, and although at the time of the patents, Wisconsin law operated to pass title to the river bed to the patentees, Wisconsin law could not and the patents did not convey to the patentees the unsurveyed islands.

The Seversons also challenge reliance on *Scott* v. *Lattig, supra,* on the ground that it dealt with an island in Idaho, not within the Northwest Territory and therefore not as a matter of compact subject to the Ordinance of 1787.[7] The argument is that since the Ordinance of 1787 guaranteed, as a matter of compact, "judicial proceedings according to the course of the common law," the common law principles said to be reflected in *Franzini* and *Chandos* are binding on the United States in Wisconsin, which was part of the Northwest Territory.

The argument has historical interest, but no authority has been cited or found showing that the construction of grants of the United States is any less a federal question in states carved out of the Northwest Territory than elsewhere, and we are not so persuaded.

The judgment is affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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7. It is interesting to note that Sec. 14 of An Act to establish the Territorial Government of Oregon, enacted August 14, 1848 (30th Congress), extended the Ordinance of 1787 over the Territory of Oregon, out of which Idaho eventually was formed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Monday, September 13, 1971.

Before

Hon. F. RYAN DUFFY, Senior Circuit Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. ROBERT A. GRANT, District Judge

No. 18476

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

CLIFFORD SEVERSON and MABEL SEVERSON,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Wisconsin

On consideration of the petition for rehearing and suggestion that it be heard en banc filed in the above entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and a majority of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above entitled cause be and the same is hereby DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-614

CLIFFORD SEVERSON and MABEL SEVERSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A6-A12) is reported at 447 F.2d 631. The opinion of the district court (Pet. App. A1-A5) is reported at 309 F.Supp. 915.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1971, and a petition for rehearing was denied on September 13, 1971 (Pet. App. A13). The

petition for a writ of certiorari was filed on November 3, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether title to unsurveyed public lands which are islands in a navigable stream is vested, by operation of law and without express conveyance, in the successor in interest of the patentee of adjacent shore lands.

STATEMENT

The United States brought this action to quiet title in itself to portions of two unsurveyed islands in the Mississippi River (Pet. App. A6, A9-A10). Petitioners, who own certain patented shorelands located adjacent to the islands, were the chief adverse claimants. The district court upheld the government's claim, and the court of appeals affirmed.

The material facts are not in dispute and are set forth fully in the district court's opinion (Pet. App. A1-A3). In the late 1800's, the United States patented and sold certain shorelands along the east bank of the Mississippi River, in the State of Wisconsin, portions of which are now owned by petitioners. Immediately west of those lands, but east of the thread of the river, are two islands, a part of which petitioners claim by reason of their ownership of the shorelands. Neither was surveyed at the time the shorelands were patented.

The channel separating the island closest to the Wisconsin shore gradually filled and became dry land.

The lands formerly composing that island were surveyed in 1935, and contain 468.15 acres. The second island is still encircled by the river, and is also sizeable. Portions of the first island have been patented to private parties or granted to the State of Wisconsin; the rest of it, and all of the second island, are unpatented and have been administered by the government as part of a federal game refuge.

The two islands were in existence when Wisconsin became a state in 1848. The district court found that the land in question "is substantial and lies above normal high water lines except in times of flood when it may be completely or partially covered by water for several weeks" (Pet. App. A3). It held that on these facts, title to the unpatented public lands comprising the islands remained in the United States under *Scott* v. *Lattig*, 227 U.S. 229; it rejected petitioners' argument that, as owners of the adjacent shore, they owned the lands in question by operation of Wisconsin law. The court of appeals affirmed, holding that *Scott* v. *Lattig* was controlling and dispositive in favor of the government.

ARGUMENT

The decision below is in accord with firmly established principles of federal law. There is no conflict or other reason warranting review by this Court.

1. In *Scott* v. *Lattig*, this Court held (227 U.S. at 244) that an island located in the Snake River, but not surveyed, when Idaho entered the Union, "did not pass to the State or come within the disposing influence of its laws. On the contrary, although sur-

rounded by the waters of the river and widely separated from the shore, it was fast dry land, and therefore remained the property of the United States and subject to disposal under its laws * * *." This principle was confirmed a few years later in *Moss* v. *Ramey*, 239 U.S. 538, and is a well-settled rule of federal land law. See, also, *Lee Wilson & Co.* v. *United States*, 245 U.S. 24; *Gauthier* v. *Morrison*, 232 U.S. 452.

As both courts below held, the facts of the present case place it squarely within the rule of *Scott* v. *Lattig*, and *Moss* v. *Ramey*. As in those cases, the lands here in issue were large, unsurveyed islands in a navigable river, to which patentees of the adjacent shorelands asserted title by reason of their owning the shorelands. The Court explained the controlling doctrine in the *Moss* case (239 U.S. 546):

> Thus the facts bearing on the status of the island and the operation of the patents are essentially the same as in *Scott* v. *Lattig*, and, in view of what was there held, it suffices to say: The error of the surveyor in failing to extend the survey over the island did not make it any the less a part of the public domain. It was fast dry land, and neither a part of the bed of the river nor land under water, and therefore did not pass to the State of Idaho on her admission into the Union but remained public land as before. The descriptive terms in the patents embraced the lots abutting on the river, as shown on the plat, but not this island lying between the lots and the thread of the stream. *Chapman & Dewey Lumber Co.* v. *St. Francis Levee District*,

> 232 U.S. 186; *Gauthier* v. *Morrison*, 232 U.S. 452; *Producers Oil Co.* v. *Hanzen*, 238 U.S. 325. The claim that the island passed under the patents is therefore ill founded. * * *

2. Contrary to petitioners' suggestion (Pet. 6-8), this case involves "fast, dry land", just as the *Scott* and *Moss* cases did. This is not altered by the fact that the islands may be partially flooded annually, or were twice totally underwater for a brief period when the water was abnormally high. The court below noted (Pet. App. A9-A10) that the islands here, like those in *Scott* and *Moss*, were high enough to have permanent vegetation and to permit farming. Thus, this case does not, as petitioner urges (Pet. 7), present an open federal question; quite the contrary, the operative facts are the same as *Scott* and *Moss*, and a result other than that reached below would have significant unsettling effects on long established federal land law.

3. Petitioners' other contentions similarly are without substance. The issue here, concerning the rights of successors in title to patentees of federal lands with respect to other federal land, "is governed by federal, not state, law" (*Hughes* v. *Washington*, 389 U.S. 290, 291). Consequently, the Wisconsin decisions on which petitioners rely are not controlling. As the court of appeals concluded (see Pet. App. A8), this is the necessary import of *Scott* v. *Lattig*. The claim that this case is different because the lands comprising the State of Wisconsin were subject to the Northwest Ordinance was correctly rejected by the court below (Pet. App. A12).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1971.

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